Pelorus Holding Sdn Bhd v Jaffa Roger Dawkins & Ors

HIGH COURT (SHAH ALAM) — SUIT NO BA-22NCVC-101–03 OF 2020
CHOO KAH SING J
25 AUGUST 2020

Civil Procedure — Mareva injunction — Real risk of dissipation of assets — Whether plaintiff satisfied all requirements for court to grant Mareva injunction against defendants

The plaintiff entered into a joint-venture agreement with the first and second defendants ('D1' and 'D2') and formed a joint-venture company ('PHLG') to carry out a commercial venture. D1 and D2 were directors of the third defendant ('D3') which carried out the same business that PHLG intended to go into. The parties had agreed that upon PHLG's incorporation, D3 would cease operations in order not to compete with PHLG. The plaintiff alleged that not only did D1 and D2 breach certain terms of the JVA, but they diverted funds meant for PHLG to D3 and also took substantial loans from the plaintiff which they did not repay. In the instant action, the plaintiff sought to recover RM3,918,723.96 from the defendants. Fearing that the defendants might dissipate or remove their assets out of the court's jurisdiction before the trial of the action, the plaintiff filed the instant application for: (a) a Mareva injunction to prevent the defendants from disposing or removing their assets up to the value of RM3,918,723.96 from the jurisdiction of the court; (b) an order that the defendants declare by way of affidavits the full value of their assets; and (c) orders to prevent D1 and D2 from spending more than RM2,000 a week respectively for their ordinary living expenses and D3 from spending more than RM10,000 a month for its business and operational expenses.

Held, allowing the application but modifying the spending restrictions on the defendants:

(1) The plaintiff had satisfied the court that it had a valid cause of action over which this court had jurisdiction, that it had a good, arguable case, that the defendants' assets were within the court's jurisdiction and that there was a real risk of the assets might be dissipated or removed from jurisdiction which would render the plaintiff's action nugatory. The risk was compounded by the fact that D1 was an Australian citizen with a permanent resident status in Malaysia (see paras 13–23).

(2) The balance of convenience favoured the granting of the Mareva injunction. The amount that the plaintiff sought to injunct was restricted to the amount of its claim. If the plaintiff succeeded, the amount would

be sufficient to satisfy its claim. If the injunction was not granted, the plaintiff might not be able to enjoy the fruits of its judgment. The defendants could not show that they were financially capable of satisfying the claimed sum if judgment was entered against them (see paras 24 & 27).

[Bahasa Malaysia summary

Plaintif memasuki perjanjian usahasama dengan defendan pertama dan kedua ('D1' dan 'D2') dan menubuhkan syarikat usahasama ('PHLG') untuk menjalankan perusahaan komersial. D1 dan D2 adalah pengarah defendan ketiga ('D3') yang menjalankan perniagaan yang sama dengan yang diputuskan oleh PHLG. Pihak-pihak telah bersetuju bahawa apabila PHLG diperbadankan, D3 akan berhenti beroperasi supaya tidak bersaing dengan PHLG. Plaintif mendakwa bahawa bukan sahaja D1 dan D2 melanggar syarat tertentu JVA tersebut, tetapi mereka mengalihkan dana milik PHLG ke D3 dan juga mengambil pinjaman dalam jumlah yang banyak dari plaintif tanpa pembayaran semula dari mereka. Dalam tindakan semasa, plaintif memohon untuk mendapatkan semula wang sebanyak RM3,918,723.96 daripada defendan. Khuatir sekiranya defendan akan melupuskan atau mengalihkan aset mereka di luar bidang kuasa Mahkamah sebelum perbicaraan tindakan tersebut, plaintif memfailkan permohonan semasa untuk: (a) injunksi Mareva untuk menghalang pihak defendan daripada melupuskan atau mengalihkan aset mereka berjumlah RM3,918,723.96 dari bidang kuasa mahkamah; (b) perintah bahawa defendan membuat deklarasi melalui afidavit jumlah kesemua aset mereka; dan (c) perintah untuk menghalang D1 dan D2 daripada menghabiskan lebih dari RM2,000 seminggu masing-masing untuk perbelanjaan biasa sara hidup mereka dan D3 daripada membelanjakan lebih daripada RM10,000 sebulan untuk perbelanjaan perniagaan dan operasinya.

Diputuskan, membenarkan permohonan tetapi mengubah halangan perbelanjaan bagi defendan:

(1) Plaintif telah memuaskan mahkamah bahawa ianya mempunyai kausa tindakan yang sah di mana mahkamah ini memiliki bidang kuasa, bahawa ianya memiliki kes yang baik dan wajar, bahawa aset defendan berada dalam bidang kuasa mahkamah dan bahawa terdapat risiko nyata aset tersebut mungkin akan dialihkan atau dilupuskan dari bidang kuasa yang akan menjadikan tindakan plaintif sia-sia. Risiko tersebut disokong lagi dengan fakta bahawa D1 adalah warganegara Australia dengan status permastautin tetap di Malaysia (lihat perenggan 13–23).

(2) Imbangan keselesaan menjurus kepada pemberian injunksi Mareva. Jumlah yang dimohon oleh plaintif untuk injunksi dihalang oleh jumlah yang dituntut. Sekiranya plaintif berjaya, jumlahnya akan mencukupi untuk memenuhi tuntutannya. Sekiranya injunksi tidak dibenarkan, plaintif mungkin tidak dapat menikmati hasil keputusan tersebut.

A Defendan tidak dapat membuktikan bahawa mereka berkemampuan dari segi kewangan untuk memenuhi jumlah yang dituntut sekiranya penghakiman dibuat terhadap mereka (lihat perenggan 24 & 27).]

Cases referred to

B *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213, CA (refd)
Menk Sdn Bhd v Joerg Hugo Schmidt [2009] 3 MLJ 205, CA (refd)

Dharman Sivalingam (Renuka with him) (Dharman Sivalingam & Partners) for
C *the plaintiff.*
Hasshahari (Mohd Rosley with him) (Hasshahari & Partners) for the defendants.

Choo Kah Sing J:

D INTRODUCTION

[1] The plaintiff filed a notice of application (encl 4) seeking for a Mareva injunction against the defendants to restrain the defendants from, inter alia, disposing or removing the assets of the defendants from the jurisdiction of the
E court, in so far as the same does not exceed the sum of RM3,918,723.96.

[2] The plaintiff also sought for orders against the defendants to disclose by way of affidavits information regarding the full value of assets owned by the
F defendants and to prevent the first and second defendant from spending more than RM2,000 a week respectively for their ordinary living expenses and also a reasonable sum for legal expenses incurred in the proceeding.

[3] The plaintiff further sought an order to prevent the third defendant from
G spending more than RM10,000 a month for its ordinary business and operational expenses and a reasonable sum that this court thinks fit for its legal expenses incurred in the proceeding.

H **[4]** On 13 July 2020, after having heard the plaintiff's application inter partes, this court allowed the plaintiff's application, but with necessary modification to the prayers. The reasons for the decision are set out as below.

BACKGROUND FACTS

I **[5]** In essence, the plaintiff's claim stems from a joint venture agreement (JV agreement) entered into between the plaintiff and the first and second defendants. Consequent to the JV agreement, a company Pelorus-HLG Sdn Bhd ('PHLG') was established on 20 June 2016. PHLG was formed to carry

out business involving livestock supply, integrated farming and breeding and et cetera.

[6] Prior to the incorporation of PHLG, the first and second defendant were directors of the third defendant company which carried out the same nature of business as PHLG. It was the understanding between the plaintiff and the first and seconddefendants that they would cease operation of the business of the third defendant company after the incorporation of PHLG — this is to avoid competition with the business of PHLG. After the incorporation of PHLG, the first defendant was appointed as the chief executive officer and was tasked to manage and operate the day to day affairs of the company.

[7] The plaintiff averred that the first and second defendants were in breach of certain terms in the JV agreement. The plaintiff also averred that the first and second defendants have failed to repay a sum of RM1m advanced to them as a loan for the business venture when the plaintiff demanded the repayment of the same. The plaintiff further averred that the first and second defendant also failed to repay the plaintiff a sum of RM516,972.02 as further loan advanced to them during the period 2017–2018.

[8] The plaintiff asserted that the first and second defendants had, in breach of their fiduciary duties as directors of PHLG, diverted a sum of RM1,188,691.94 from PHLG to the third defendant company in which they have material personal interest.

[9] The plaintiff also asserted that the first and second defendants failed to repay the third defendant's loan with Agrobank in a sum of RM1,213,060, and that the plaintiff had advanced a sum of money in the same amount to the first and second defendants for the purpose of repaying Agrobank.

REASONS FOR THE DECISION

[10] In substance, the first and second defendants have refuted the plaintiff's claim in that the plaintiff did not give any loan to the defendants and the defendants did not give any guarantee to the plaintiff. The conflicting narratives of the parties are matters that ought to be dealt with in a full trial by the court.

[11] In so far as the plaintiff's application (encl 4) is concerned, the focus of this court is whether the plaintiff has satisfied the requirements for an order in the nature of a Mareva injunction to be granted to the plaintiff against the defendants.

[12] Essentially, an application for an order of a Mareva injunction would be

allowed when the court is satisfied that there is a risk that a defendant, over whom a plaintiff has a proprietary claim, may dissipate or remove his assets out of the court's jurisdiction so as to defeat the plaintiff's claim (see *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213).

[13] The first requirement in order for the court to grant a Mareva injunction is for the plaintiff to satisfy that it has a valid cause of action over which this court has jurisdiction.

[14] Based on the plaintiff's narrative, its cause of action is centered on a complaint that the first and second defendants have breached the terms in the JV agreement. The plaintiff also complained that the first and second defendants have breached their fiduciary duties as directors of PHLG. The plaintiff further complained that there were loans advanced to the first and second defendants, and that they failed to repay the same. The JV agreement is subject to Malaysian law; the alleged breach of fiduciary duties involved a Malaysian incorporated company and happened in Malaysia; and the alleged loans were transacted in Malaysia. Hence, all of the plaintiff's complaints are within the jurisdiction of this court, and are able to form the basis for valid causes of action in law.

[15] Whether the plaintiff could successfully prove its case or not is premature to be determined at this juncture. Nevertheless, it is incumbent upon the plaintiff to satisfy this court that it has a good arguable case which forms the second requirement for this court to consider. 'A good arguable case' in the context of a Mareva injunction is 'one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success' (see *Menk Sdn Bhd v Joerg Hugo Schmidt* [2009] 3 MLJ 205 (CA); *Malaysian Civil Procedure* 2013, p 394).

[16] The threshold for the plaintiff to show it has a good arguable case is that it does not necessarily need to tilt the scale of justice in its favour. 'A good arguable case' does not connote a case which is definitely winning. As long as the plaintiff is able: (a) to present a claim in a coherent and logical manner; (b) to present a reasonable and plausible narrative that could be believable in support of its claim; and (c) to demonstrate that the cause of action is capable of relying on certain principles of law that could give rise to a potential claim with conceivable remedy(ies), these would suffice to satisfy the meaning of 'a good arguable case'.

[17] In the present facts, the plaintiff's narrative is that there was a JV agreement, and that the first and second defendant committed breaches of the terms of the JV agreement. The plaintiff alleged that first and second defendants had breached their fiduciary duties as directors of PHLG by

diverting funds to the third defendant company which belongs to the first and second defendants. The plaintiff also alleged that it had advanced loans to the first and second defendants. All of these allegations are supported by some form of documents which were exhibited to the plaintiff's affidavits (although the contents have not been proved). This court, after having scrutinised the documents, is satisfied that the plaintiff has a good arguable case, and it is sufficient to warrant for a trial so that the plaintiff and defendants could have their day in court.

[18] The third requirement that this court has to consider is where the defendants' assets are situated. The prayers sought by the plaintiff are related to all the defendants' assets which are within the jurisdiction of this court in Malaysia. The bank accounts which the plaintiff sought to restrain the defendants from dealing with are bank accounts in Malaysia. Hence, the third requirement is satisfied.

[19] The fourth requirement that the plaintiff needs to satisfy the court is there is a real risk of dissipation of assets, or removal of assets from the jurisdiction of this court which could render the plaintiff's judgment, if obtained, ineffective.

[20] The plaintiff's action is not just mounted on a breach of the JV agreement; in substance, the plaintiff is questioning the financial probity of the first and second defendants. This touches on the integrity of the first and second defendants' characters as individuals.

[21] One of the plaintiff's claims is that the first and second defendants had diverted more than a million Ringgit from PHLG for their own benefit. This alleged fact gives rise to a risk that the first and/or second defendants may dissipate their assets in view of the pending litigation initiated by the plaintiff. Although there is no direct fact which implicates the first and second defendants had dissipated their assets, there is a real risk that they might do so in view of the plaintiff's allegation.

[22] Further, the first defendant is an Australian citizen with a permanent resident status in Malaysia. As such, there is a further risk that first defendant might remove his assets out of the jurisdiction of this court. Removing assets, particularly cash-in-hand in whatever currencies the first defendant holds, could easily be done in today's global financial world. A mere click of a few buttons on the computer could easily transfer thousands of Ringgit from one account to another account which could be located anywhere out of the jurisdiction of this court.

[23] After having considered all the above facts, this court is satisfied that the

risk that first and second defendants might dissipate their assets out of the jurisdiction of the court is real, particularly since the assets are in the form of cash.

[24] This court has considered the balance of convenience in favour of granting the injunction. The amount that the plaintiff sought to injunct is the amount the plaintiff is claiming. In the event the plaintiff succeeds in its claim, this amount would be able to satisfy the judgment sum. If after the defendants have disclosed the total amount of their assets and they are not sufficient to match the amount sought by the plaintiff, the defendants could always seek this court to review the sum stated in the injunction order.

[25] The amount sought by the plaintiff for the injunction is limited to RM3,918,723.96, as such, any amount that exceeded the said sum will not be affected by the order, if granted. The defendants are free to deal with the excess funds, if any.

[26] The prayers in the plaintiff's application have provided the defendants the necessary provisions for their daily expenses and necessary costs in the running of their businesses and the legal expenses for the litigation.

[27] Conversely, if the injunction is not allowed, the plaintiff might not be able to enjoy the fruits of the judgment if the defendants' assets are insufficient to satisfy the judgment sum because the assets have already been removed or dissipated. The defendants could not show that they are financially capable to satisfy the claimed sum if judgment is entered against them.

[28] The defendants' counsel raised several objections to the plaintiff's application, but those objections could not resist an injunction to be granted against the defendants.

[29] One of the objections raised is that there was no resolution passed in PHLG for the plaintiff to initiate this action. In so far as the plaintiff's right is concerned, it derives from the JV agreement, not from PHLG. The plaintiff's status in this action is not representing PHLG. The plaintiff's position in this action is as an investor rather than as a shareholder of PHLG.

[30] Further, the defendants' counsel also raised the issue that the plaintiff did not come with clean hands in that it did not disclose the plaintiff had filed a suit prior to this action. The plaintiff had earlier filed a suit in the sessions court (BA-B52NCvC-329–09 of 2019), and the claim was based on a guarantee agreement. The case was struck off by the sessions court. The first and second defendants had lodged a police report alleging that the signatures in the purported guarantee agreement were not theirs.

[31] This court has considered this fact of the previous suit and found that its non-disclosure would not negate the fact that there is a real risk that the first and second defendants could dissipate their assets. The fact of non-disclosure of the previous suit would not prejudice the defendants, and likewise, the police report lodged by the defendants concerning the forged signature is a separate matter which could be dealt with in the trial.

[32] As far as the plaintiff's application is concerned, the plaintiff is trying to maintain the financial status of the defendants to ensure the plaintiff's interest is secured in the event this suit ends in its favour.

[33] The defendants' counsel also raised an objection that the plaintiff did not provide an undertaking as to the damages in the event it is found that the injunction ought not have been granted. This objection is flawed, the plaintiff did provide an undertaking in the supporting affidavit at paras 65–66 (encl 5) affirmed by Mohd Farhan bin Razali.

CONCLUSION

[34] For the reasons given above, this court allowed the plaintiff's application with the necessary modification. This court took into account the personal financial commitments of the first and second defendant as well as the running costs of the third defendant company to meet its daily and monthly expenses, as such, the court made the following modifications to the plaintiff's prayers and allowed prayers 2–4 as modified:

(a) in prayer 2, seven days was changed to 14 days; this is to allow the defendants more time to comply with the order;

(b) the weekly amount for personal spending of the first and second defendant was changed to RM3,500 from RM2,000 in prayer 3; and

(c) the monthly spending amount of the third defendant was changed to RM30,000 from RM10,000 in prayer 4, and the third defendant was to be given the liberty to apply to the court to vary the amount if necessary.

[35] Beside the above modified prayers, prayer 1 was also allowed without amendment. This court ordered that costs be in the cause for this application.

Order accordingly.

Reported by Ashok Kumar